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Access to Public Lands

by Mary Oleson
Bureau of Land Management, Lewistown, Mont.



Resources Development Internship Program
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ACCESS TO PUBLIC LANDS

A Situation report for the Fergus Planning Unit

By: Mary A. Oleson

Sponsored by: Bureau of Land Management

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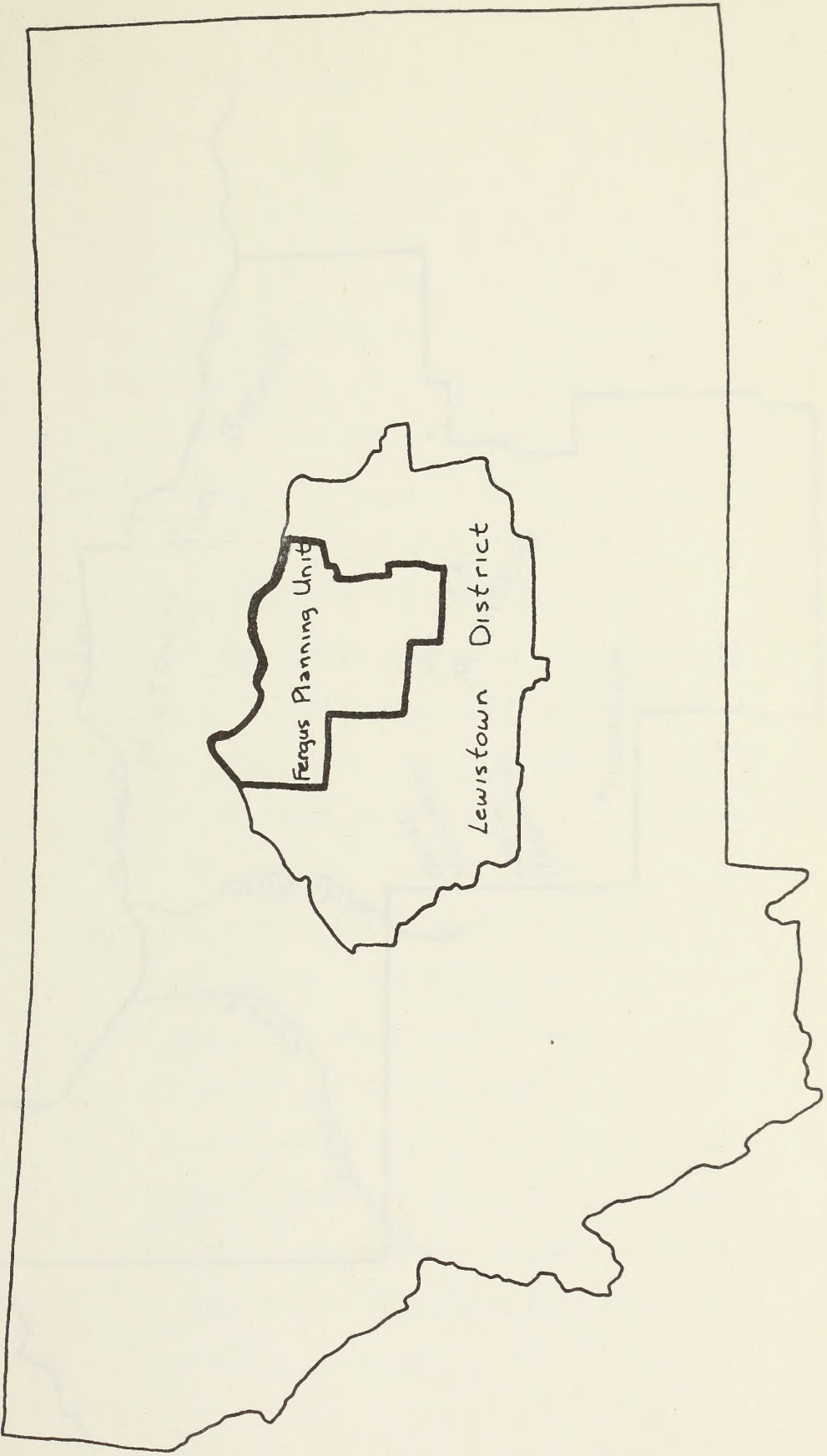
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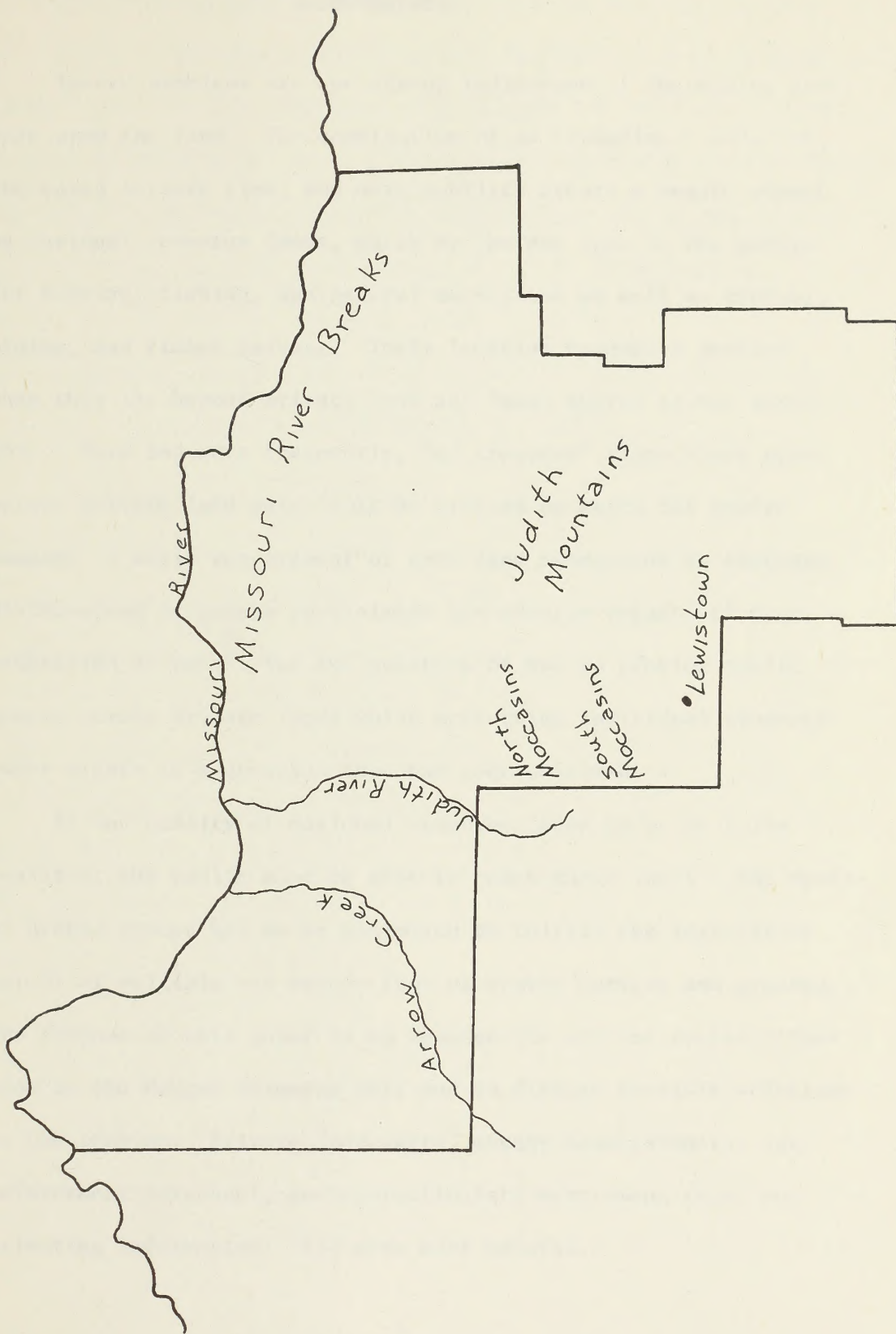
Synopsis

The use of public lands becomes a problem when they lie beyond private land and legal access is not available. Most access problems are caused by the actions of thoughtless individuals who litter, destroy private property, or in any other way show disrespect for land. This leads to increased closure of roads across private land, and overuse of those public lands still having good access. Until legal access can be provided in conjunction with full user management, the problem may be alleviated by 1) a vigorous education and information program; 2) improved maps; 3) public land identification; and 4) installation of cattleguards.



Fergus Planning Unit

Lewistown District



INTRODUCTION

Access problems are one strong indication of increasing pressure upon the land. The combination of an expanding population, increased leisure time, and more mobility create a severe impact on national resource lands, which by law are open to the public for hunting, fishing, and general recreation as well as grazing, mining, and timber harvest. Their location becomes a problem when they lie beyond private land and legal access is not available. More and more frequently, "no trespass" signs block roads across private land which must be crossed to reach the public domain. A basic requirement of good land management is adequate distribution of access to minimize the adverse impacts of concentration of use. Yet the question of how to provide public access across private lands while preserving individual property owner rights is a question that has gone unsolved.

If the utility of national resource lands is to be fully realized, the public must be able to reach these lands. The denial of access routes has to be minimized to fulfill the legislative intent of multiple use beyond that of timber harvest and grazing. The purpose of this paper is to examine the current access situation in the Fergus Planning Unit and to discuss possible solutions to the problem. Private landowners, county commissioners, law enforcement personnel, and recreationists were among those contributing information. All were most helpful.

No real solutions to the access shortage have yet been reached, nor are any presented in this study. However, a number of actions are identified which may greatly help to reduce the problem now and in the future. These measures include a vigorous information and education program, increased public land identification, and acquisition of legal easements.

CHAPTER I: THE RESOURCE

The Fergus Planning Unit is located in central Montana and consists of Fergus County, southeast Chouteau County, and a small part of northeast Judith Basin County. Population is sparse, averaging less than two persons per square mile. Lewistown, the Fergus County Seat, has a population of 6,437 and is the only urban area in the unit. The closest major commercial centers are Great Falls, 109 miles to the northwest, and Billings, 129 miles to the south.

The major industry is agriculture, primarily cattle ranching and wheat farming. Approximately fourteen percent of the Planning Unit area, or 381,773.06 acres, is administered by the Bureau of Land Management. In accordance with the Taylor Grazing Act, these lands are currently being leased for grazing. Additionally, they are open for other multiple uses such as mining, recreation, and timber harvest. Demand for recreation use, especially hunting, is increasing rapidly, and as a result the shortage of legal access

is being noted by more and more users.

The climate ranges from semi-arid on the plains to subhumid in the foothills and mountains. The plains area is characterized by moderate rainfall, relatively low humidity, and great temperature extremes. Summer temperatures in the northern part of the unit especially may be very high. However, the low humidity is a mitigating factor. Winter extremes, while often severe, are not often accompanied by strong winds. The average frost free period dates from late May or early June to the middle and last of September.²

Topography is predominantly broad, rolling plains with isolated mountain ranges. Along the Missouri River at the northern boundary of the unit are the badlands, or "breaks". This area is composed of highly erosive soils which have developed into a maze of ridges and deep coulees. They are sparsely covered with stunted yellow pine and grasses. These badlands also border Arrow Creek and Judith River--here, livestock and wildlife movement is greatly restricted. The rest of the plains consist of rolling grasslands. The Judith Mountains and North and South Moccassins are characterized by steep slopes and heavy timber.

In the north and northeast portion of the planning unit soils consist of a soft, dark-gray gumbo-shale, called Bearpaw shale. It is subject to landslides and large scale slumping along drain-³ages and in disturbed areas. Roads over "gumbo" soils become extremely muddy and impassable when wet--as a result, access to many

areas during wet weather is severely limited.

Wildlife is abundant throughout the planning unit, as is evidenced by the extremely high influx of hunters in the fall. Mule deer are the most abundant big game species and are found in all areas. Their population size appears to be limited by the quality of the habitat. Other important big game species include white-tailed deer, antelope, and elk. Bighorn Sheep and Rocky Mountain Goats have been introduced with some success in small selected areas. Upland game birds are also an important wildlife species, and populations included sage grouse, sharp-tailed grouse, pheasants, etc.

CHAPTER II: THE ACCESS SITUATION

As is common with national resource land, large areas administered by BLM in the Fergus Planning Unit are without legal access. Three primary contributing factors are 1) the physical remoteness of public lands from established roads; 2) the lack of clearly visible identification of public land boundaries; and 3) the control of access and entry to public lands by private landowners. Although most ranchers are quite willing to allow public use of roads across their lands at this time, there is much concern over how long this goodwill will last. Unsupervised public use commonly is associated with increased problems of vandalism, litter, theft,

etc. Under these conditions, an accelerated trend of road closure may be expected.

In general, BLM lands do not possess the unique scenic, natural, historical or archeological characteristics present in the National Park Service lands, nor do they usually function as important wildlife conservation centers. With the exception of fall hunting, public use of these lands is typically low density in nature and limited personnel are available for the purpose of use supervision.⁴

However, as leisure time and mobility increase, so does the demand for recreation as a primary land use. Closely related to the demand for recreation is the amount of land available for it, particularly where more and more public lands are isolated either by lack of roads or by posting. Easily accessible areas tend to become overcrowded and/or abused, and as a result, public attention begins to focus on more remote areas. Conflicts increase as recreationists begin to use new lands without supervision or consideration for the ability of the resource to support additional use. Road closures increase in direct relation to the level of landowner/public conflicts.

Access problems are brought to the public's attention during the fall hunting season, when the demand for use is at its peak. Hunters are commonly held responsible for damage to private land-- a fence may be cut, a gate left open, livestock scattered. These indiscriminate, unthinking acts contribute to the rancher's increasingly hostile actions and attitudes.

Trespass is perhaps the most troublesome offense. The County Sheriff reports that the largest number of trespass complaints occur during the fall hunting season. A large proportion of cases are accidental in nature, and are largely an outcome of fragmented land patterns and lack of public domain identification. Also, in remote areas, it is easy for the public to assume the attitude that all open lands are for public use. Finally, the distribution of the game itself contributes to the situation, since antelope, which prefer rolling grassland, are primarily found on private lands.

The restricted use of some areas has definite impacts on game management. Richard J. Mackie, associate professor of Wildlife Management at Montana State University, conducted some interesting comparisons between access and mule deer harvest. He studied three adjacent, similar areas of the Missouri Breaks--all contained good deer numbers and large tracts of public lands, but while two areas had good access, that to the third was poor. Hunting pressure was found to be directly related to access--the third area had a correspondingly smaller harvest of deer. It was also found that deer harvested from the two easily accessible areas averaged seven to twenty pounds heavier than ones of the same age coming from the third area.

In some cases, lands that are easily accessible receive so much more hunting pressure that use levels may become dangerously

high. This is a particular problem in the areas surrounding the Judith Mountains. Undoubtedly because of the heavy use from other recreationists, miners, and timber companies, proportionately more land here is closed to public access. Remaining open lands receive more and more use until overhunting may become a problem. Often friendly ranchers will close access across their lands in order to protect wildlife when they know this is occurring.

Off-road recreational vehicle use is one of many uses of federally-owned lands. At the same time, it is a highly controversial activity, which often conflicts with other land uses and other uses. ORV use is potentially one of the most extensive recreation activities on public lands--management of more widespread use will be one of the most difficult problems resulting from improved access. Therefore, a brief discussion of the problem is included in this paper.

Because of the tremendous growth of ORV use on public lands and its impact on the environment, the BLM undertook a preliminary study of off-road vehicles in 1968. As defined by the Bureau, an ORV is "any vehicle (including standard automobiles) designed for or capable of travel on or immediately over land, water, sand, snow, ice, marsh, swamp⁶land, or other natural terrain." The initial study indicated the emerging problems and conflicts with the land and with other users of the resources. Among those identified were soil displacement, vegetative damage, littering, and interference with wildlife, livestock, and recreation pursuits. The results

showed that off-road vehicle use had to be managed.⁷

the established government policy states that the use of ORV's on public lands is a legitimate part of the multiple use concept provided that conflict with other activities and with the preservation of resources is minimized. Of all the Interior agencies, the BLM has the most open land use policy--all of their lands are open to motorized vehicle use except where specifically restricted.⁸ Yet the BLM is one agency that totally lacks enforcement authority.

One of the greatest controversies is precipitated when an ORV user ventures into quiet and serene outdoor areas previously accessible only by foot or horseback. Noise is an incompatibility which does not lend itself to an easy solution. Other conflicts include vandalism, trespassing, and lack of safety features on vehicles.⁹

Californis is far ahead of the rest of the country in meeting ORV problems, and much can be gained through a study of their experience. The Folsom District is notable in its management attempts. Typical conflicts existed in the Panoche Hills of Fresno County--ORV's competed with livestock grazing, gamebird nesting, hunting, and other recreation pursuits. To relieve the problem a special use area was established which consisted of approximately 1,160 acres of intensive use land, 12 miles of access road, and 15 miles of trails. Special rule brochures and maps were developed and handed out to users in the area. Weekend patrols were run by personnel from the BLM, Fish and Game, Division of Forestry, Sheriff's

Department, and local motorcycle clubs in an attempt to enforce the regulations. In spite of this, management attempts failed. A patrol would approach riders in unauthorized areas but the riders would evade them by dashing off across country to another area. Violators caught by deputies avoided punishment by giving false identification. Associated with indiscriminate riding were serious injuries. Although only a small percentage of the users ignored the regulations, extensive damage to the land resulted. With ineffectual control, non-observance of rules and regulations, and lack of sufficient manpower, money, and authority, the area was ultimately closed. Although the Panoche area is unique in being easily accessible to large numbers of people, similar problems may be expected on any lands open to ORV use.

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The Fergus Planning Unit is already experiencing a considerable amount of off-road travel by pick-ups, 4-wheel drive vehicles, trailbikes, etc. Much of this use is associated with hunting and is concentrated in the fall. Although new State regulations prohibit the use of vehicles off of established roads except for the recovery of game, the law is largely unenforceable due to the extensive amount of land to be patrolled. The result is that hunters may continue to drive along ridges in search of game, creating new roads and erosion problems. This trend is likely to continue until the BLM obtains enforcement authority and additional personnel. In some cases, the restriction of access is the

only way to protect Federal lands from this degradation.

The creation of new roads is not only an outcome of off-road recreational vehicles use. Most of the access roads in this unit are unimproved and unmaintained--during wet weather they become muddy and impassable. Channeling of runoff creates accelerated erosion along tracts, and in a short time the original road becomes impassable. As a result, vehicles must break new trails--in some areas, two roads, one impassable, may parallel each other. This is a direct result of the lack of road maintenance, and a situation which would be remedied through the acquisition of legal rights-of-way, since maintenance would then be provided.

Trailbike riding is an increasingly popular activity. Arrow Creek and the Judith Mountains are two of the most heavily used areas. The combination of the difficulty of public domain identification and the rugged nature of these lands contributes to considerable illegal use of private lands. Numerous trails leading up slopes are already evident. Since this use is now totally unregulated, the potential for extensive land damage is high. If a rancher wants to protect his property, his only recourse will be to post roads providing access across his land.

Prospecting for minerals is an on-going activity throughout the unit and particularly in the Judith Mountains. Although there is no intensive mineral production at this time, past mining practices have created a public sentiment strongly against further

mineral exploration. Prospectors are denied access across private lands with more frequency than other users, largely due to the rancher's fear of a significant mineral discovery and subsequent mining operations near his land. It may be said that this attitude had denied the public the benefits of possible mineral resources on tracts of land having limited access.

Increased exploration on public lands in the future will probably center around metals and natural gas. Metal resources are confined to the Judith Mountains and the North and South Moccasins. Unfortunately, these areas receive heavy use from recreationists and timber companies, and conflicts are common. Existing legal access is inadequate and landowner relations are poorer than in other parts of the unit. Ranchers are well aware of mining laws which could force them to grant easements across their land--this knowledge contributes to the general hostility.

Natural gas exploration will undoubtedly be centered in the Missouri Breaks area. In the past the low profitability and low yield nature of gas extraction has limited interest in drilling. However, with the impending energy shortage, exploration for drilling sites is likely to increase. While legal access in the Breaks area is not adequate for extensive exploration, rancher relations in general are very good. A significant factor in this situation is that natural gas extraction requires a minimal amount of soil disruption.

Some individuals have expressed concern that additional legal access to public lands may have significant impacts on fire hazard and control. However, current records do not lend support to this premise. Rather, they show that the incidence of man-caused fires in this planning unit has been extremely low in the past, possibly because the heaviest use by the public occurs during the fall hunting season when fire danger has been reduced by cooler days and nights. Also, there are no facilities for camping or picnicing on local public lands, so tourist use levels are quite low--man-caused fires are considered to be a danger primarily in areas where tourist use levels are very high.

In spite of this, there are some groups who believe that increased public access will have a major impact on fire hazard. The Chouteau County Commissioners used fire danger as a primary justification for their strong opposition to increased legal access. Records of fire occurrence, however, show that fire incidence in the Chouteau County portion of the planning unit is less frequent than in other areas. Additionally, use levels would not increase substantially enough to alter this situation. Basically, then, conditions do not support the premise that there will be a significant increase in fire hazard.

From the standpoint of firefighting, a possibility exists that a fire crew enroute to a fire may encounter a locked gate on private land. Although this has not happened in the past, it

is an increasing possibility as more lands become closed to free access. In this situation, the solution would be to simply cut the fence and proceed to the fire. There is ample justification for this action, and it would be unrealistic to attempt to gain control of all roads which may be needed for fire access.

CHAPTER III: FACTORS CONTRIBUTING TO ACCESS PROBLEMS

It should be realized that lands now posted didn't start off that way. Usually it takes a specific incident to inaugurate the first "no trespassing" sign.

The frequency with which gates are left open is one common complaint. Ranchers rapidly become frustrated and hostile when their stock is scattered time after time, particularly when the loose animals damage other pastures or grain fields. No landowner will want to grant access when he loses money as a result. However, input from the private sector indicates that the installation of cattleguards has significantly reduced this problem.

Certainly the provision of increased legal access will require the provision of additional public services. In the mountain areas particularly, demand for recreational use is high--yet even where legal access is already provided, there has been no development of use areas or adequate litter and sanitary facilities. The result is unregulated use of private and public lands alike, with widespread

littering and off-road vehicle use. It is significant to note that the mountains have the highest proportion of hostile land-owners and even friendly ones state that the public is a nuisance.

The need for supervision of users will certainly increase with provision of more legal access. Experience has shown that the public needs to be managed to minimize problems of littering and vandalism, game harvest, and off-road vehicles. This is one of the most difficult aspects of the access situation. The BLM does not at this time have the authority to enforce regulations on public lands. County and State officials must be relied upon to police these areas--however, these agencies have limited personnel and authority, so the most they can do is respond to citizen complaints. According to the County Sheriff, this is a very ineffective method of control, for problems generally occur in remote areas, and by the time officials arrive the offenders are gone.

Another critical problem is that Federal regulations pre-empt State and County laws and are enforceable only by Federally employed personnel. For example, rules and regulations pertaining to the use of off-road vehicles on Federal lands can be enforced only by Federal law enforcement authorities.¹² This means that in this planning unit, ORV regulations must go unenforced on public lands since BLM employees do not have police power. State and County officials cannot act until offenders cross to private lands.

There is an additional aspect to rancher/public relations which

is all too often overlooked--the public's general lack of respect for an individual's property rights. In an interview conducted by "Sport's Afield" a rancher stated:

"When you came through that door you knocked first, then waited until I invited you in. Well, this land of mine is just as private to me as my home. If somebody walks on it, I want to be asked first. I'll never say 'no' without a good reason, but I want to know who's on my land and how many there are. I think that's my right." 13

This respect for an individual's right to be asked permission is a fundamental of good rancher relations, and is one of the primary keys to keeping access routes open.

The desire to be asked permission is strong even where users are merely crossing private land enroute to public domain. This is especially true where public lands are poorly marked, making accidental use of private land a strong probability. Most ranchers do not seem particularly concerned with the mistaken use of their land, as long as they have been contacted by those involved.

Many ranchers have locked gates on roads crossing their lands but are most willing to open them if asked. In fact, one rancher in the Judith Mountain area has developed a small picnic ground on his own land for public use. His only requirement is that users stop by his house and ask permission--and he has a locked gate on the access road to insure that they do. Unfortunately, many users feel that a locked gate is a sign of hostility and will not attempt to find the landowner. This misunderstanding has contributed to the

impression that access is limited. While there are indeed some ranchers who will allow no one across their lands, most are only concerned with knowing when someone is there. In many respects, these ranchers seem to have assumed the responsibility of safeguarding public lands adjacent to their own. When they feel use levels are too high, they begin to refuse access.

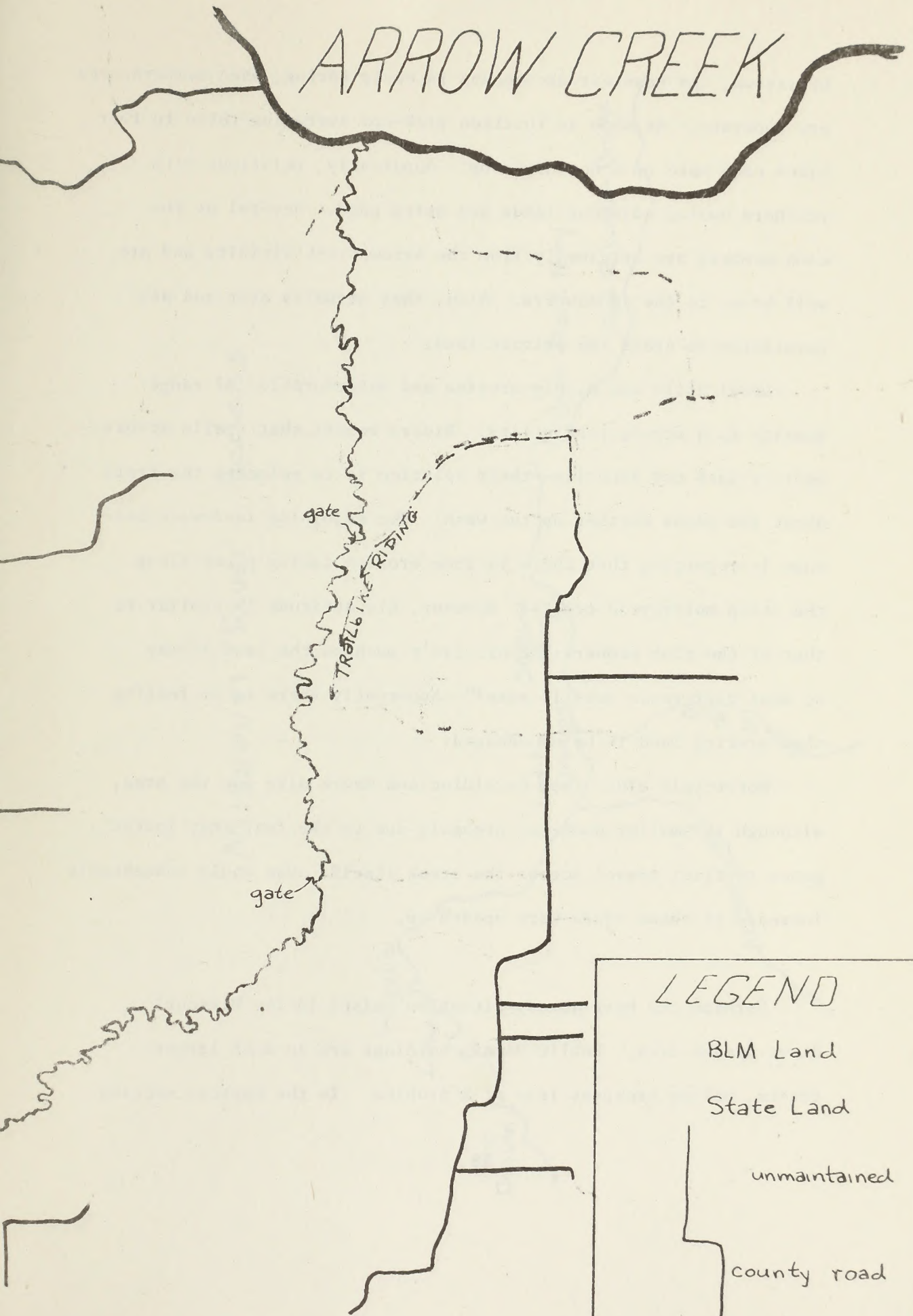
CHAPTER IV: SOME SPECIFIC AREAS

Access to Arrow Creek is entirely dependent upon the rancher's goodwill. Unmaintained trails from the county roads to the bluffs above the creek are generally open for public use. Although the two routes crossing the creek itself are blocked by locked gates, BLM lands on each side of the creek are accessible and no attempt has been made by the rancher to keep the public off of these access roads.

Travel along the river in a north-south direction is greatly restricted due to deep gullies and ridges. Reportedly there is one trail close to the creek which is passable--this road is entirely on private land and use of it is done in trespass. There is only one rancher who would like to see public use more restricted, but he has not yet posted roads across his property.

Arrow Creek is a popular area for trailbike riding. According to the President of the Trailbike Riders Association of

ARROW CREEK



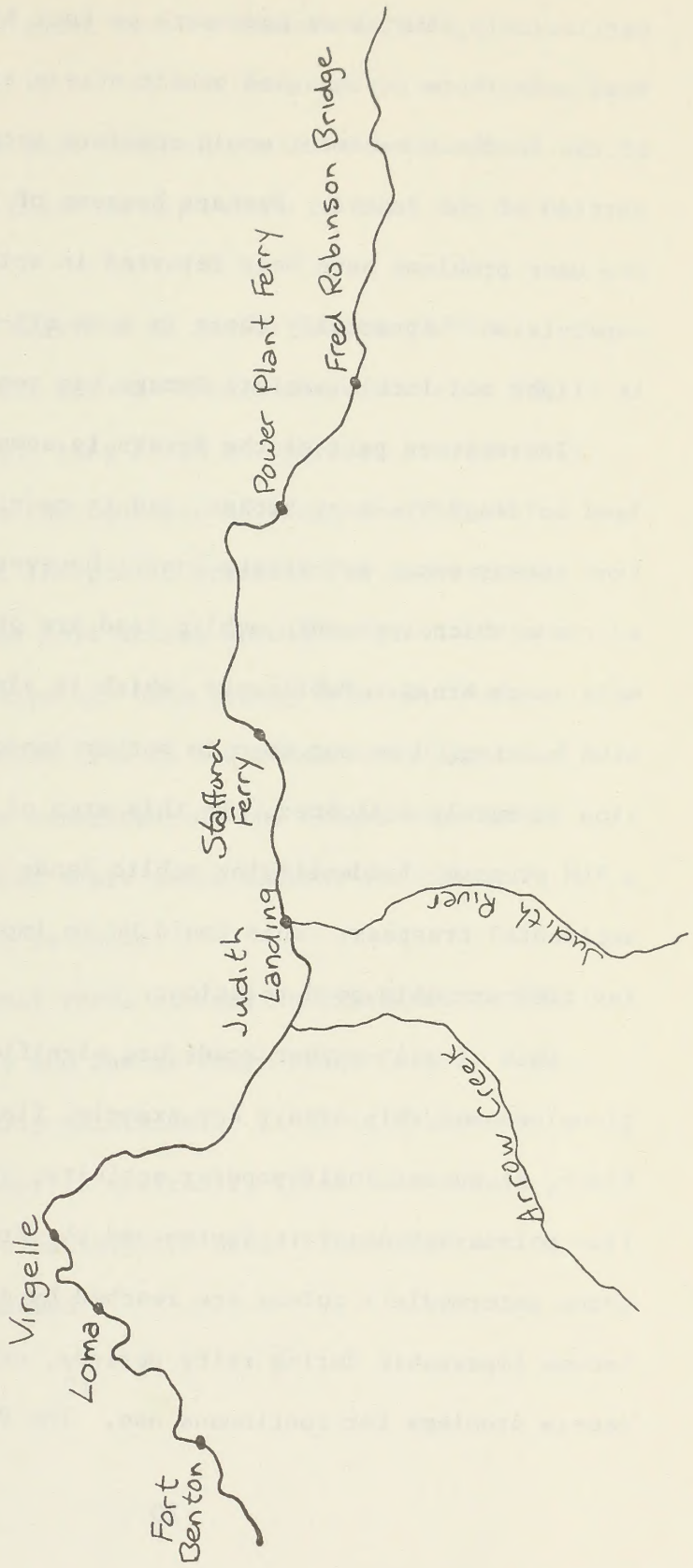
Lewistown, the heaviest use occurs in early spring, when temperatures are moderate. As many as thirteen pick-ups averaging three to four bikes each make up a normal group. Apparently, relations with ranchers owning adjacent lands are quite good. Several of the club members are originally from the Arrow Creek vicinity and are well known to the landowners. Also, they normally stop and ask permission to cross the private land.

Local soils are highly erosive and deterioration of range quality is a strong possibility. Riders report that trails across gullies wash out annually--their solution is to relocate the trail about ten yards further up the wash. The adjoining landowner concurs in reporting that there is some erosion taking place along the steep motorcycle trails. However, his attitude is similar to that of the club members--"there isn't much on the land anyway so what difference does it make?" Apparently there is no feeling that grazing land is being damaged.

Motorcycle clubs from Geraldine and Havre also use the area, although in smaller numbers, probably due to the fact that locked gates restrict travel across the creek itself. Use would undoubtedly increase if these roads were opened up.

Perhaps the best access situation exists in the Missouri River Breaks area. Public domain holdings are in much larger tracts, making trespass less of a problem. In the eastern section

Missouri River Access



particularly, BLM owned easements on Knox Ridge Road and Two Calf Road contribute to the good public access situation. Acquisition of the Woodhawk easement would complete access needs in this portion of the Breaks. Perhaps because of its isolated location, few user problems have been reported in spite of the lack of supervision. Apparently there is some off-road vehicle use but it is slight and little surface damage has resulted.

The western part of the Breaks is somewhat different. Public land holdings are more broken, and in nearly all cases are separated from county roads by private land. However, the numerous unmaintained roads which lead onto public land are generally located away from main ranch areas. Public use, which is almost entirely associated with hunting, does not seem to bother landowners although permission is rarely solicited. In this area of irregular land patterns, a BLM program of identifying public lands would help to minimize accidental trespass. This could be an important factor in preserving the currently good relations.

Lack of all weather roads has significantly restricted recreational use of this area. For example, floating on the Missouri River, an increasingly popular activity, depends on access at five points between Fort Benton and the Fred Robinson Bridge. The three intermediate points are reached by dirt roads which often become impassable during rainy periods, creating serious physical access problems for continuous use. The President of the Billings

Boat Club states that the biggest problem members face is the condition of the roads. It is not at all uncommon to get stuck, and lately all outings have been in groups with at least one 4-wheel drive vehicle. If there is any chance of rain the outing is cancelled.

From Lewistown use is heaviest at Judith Landing, where road conditions also restrict access. While these roads do not necessarily need to be paved, they could be upgraded considerably. This task would now fall to the county. However, the BLM is currently receiving most of the public pressure for improvement.

The question of whether more access should be provided to facilitate shorter float trips has been widely debated. Some users indicate that they would like to see roads every ten to twelve miles. However, the topography of the Breaks area makes this almost impossible. Road scars would destroy the scenic quality for which the river is known.

There are two additional roads already in existence on BLM land--one at Stafford Ferry and one at Power Plant Ferry. Both are very steep and are poorly maintained. If it is determined that more access to the river is desirable, these roads could be upgraded considerably to satisfy the need. The construction of new roads is not recommended.

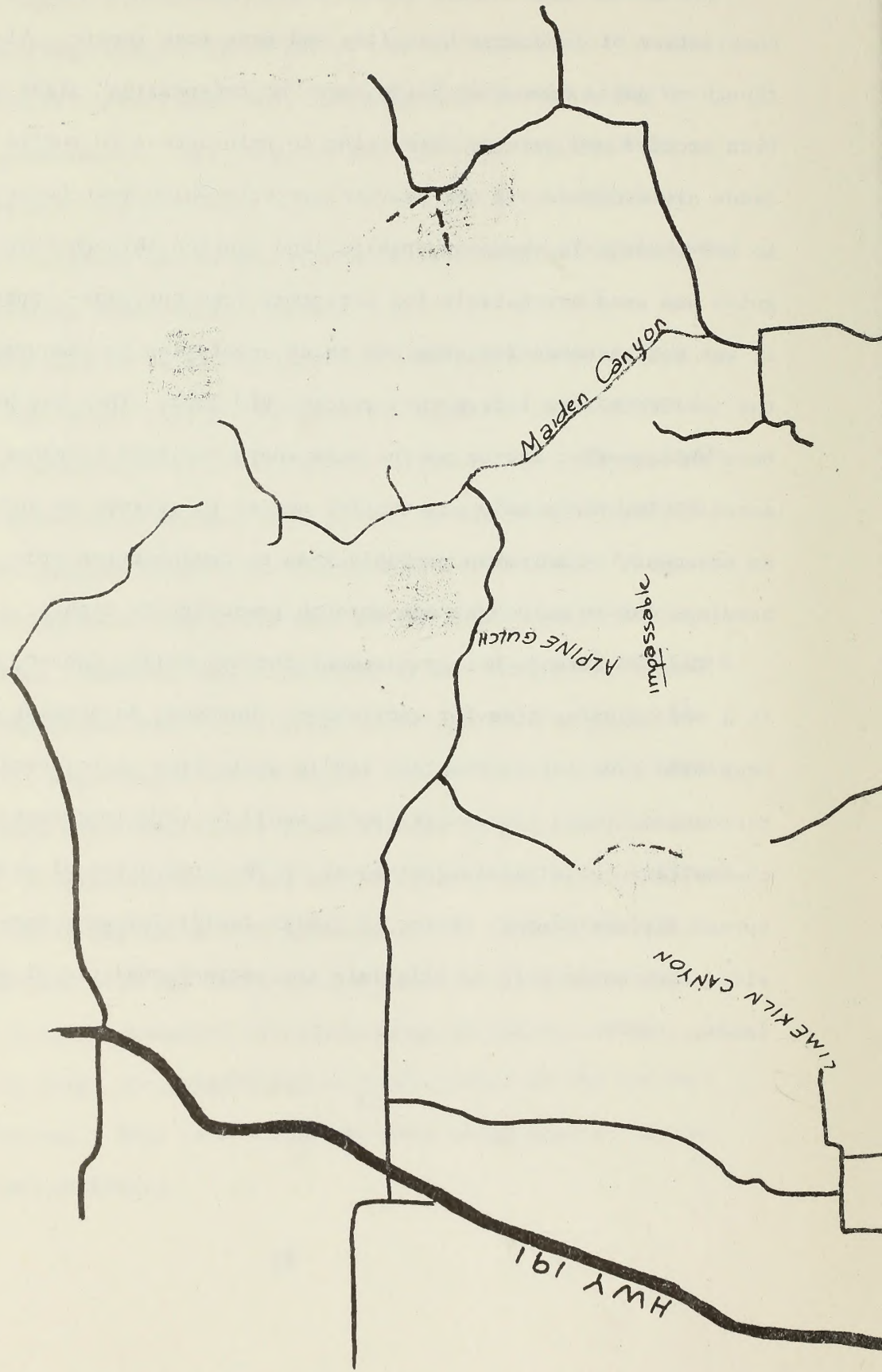
Access problems are most severe in the Judith Mountains. A significant factor in this situation is the wide variety of uses the area receives--conflicts are common between ranchers, recreationists, prospectors, etc. Also, since BLM land is generally steeper and more inaccessible, unauthorized use of private land is frequent. Foothills, where hunting is best, are privately owned and are largely closed to public access.

Limekiln Canyon is an example of an area where access is a problem. BLM signs clearly identify the roads into the canyon, but the boundary of public domain land is not marked. These lands are located well within the canyon, where steep slopes and thick vegetation restrict travel off of the established road. As a result, the public is using adjoining private land for motorcycle riding. Numerous trails up steep slopes have been developed and each summer the number increases. This trend is similar in many ways to the initial trends in the Panoche Hills of California.. Additionally, the road is poorly maintained and the adjoining landowner is often asked to aid stranded recreationists. Although his attitude is currently very good, he states that "there are too many people with too much free time and too little supervision." Since degradation is taking place on private rather than public land, the possibility of road closure in the future is quite strong. This is a situation where management of use is an immediate necessity.

Access to Alpine Gulch has been restricted this year by a combination of landowner hostility and poor road repair. Although no gates have been build, new "no trespassing" signs have been erected and persons attempting to gain access to public lands are escorted off the private property which must be crossed to get there. In the past, public land reached through this gulch was used extensively for Christmas Tree cutting-- apparently it was not uncommon for snow and thick vegetation to encourage the public to stop before they reached BLM land. This may have been an important factor in the landowners decision to close off access. The BLM's only alternative now is to attempt to buy an easement, which would probably lead to condemnation proceedings, or to establish one through prescriptive rights.

The BLM already has an easement through Maiden Canyon, which is a very popular area for recreation. However, no attempt has been made thus far to regulate public activities or to develop recreation areas. Such development would be very important in channeling use and would contribute to the prevention of widespread surface damage. Also, if public facilities were provided they could help to alleviate the recreational use of private lands.

JUDITH MOUNTAINS



CHAPTER V: LEGAL SOLUTIONS

An easement is defined as the privilege granted to one party to cross the property of another. Since any unauthorized entry upon the lands of another is viewed as trespass, the purchase of easements would provide a legal route for the public to gain access to isolated BLM lands.

Easements may be acquired through direct purchase, condemnation, or prescriptive rights. A critical drawback to these methods of acquiring legal access is the amount of time required to appropriate funds and complete negotiations and/or court proceedings. There is also a need for personnel who are willing to identify access needs and follow the process through to the end. Public agencies such as the BLM are also very hesitant to initiate court action because they could produce poor landowner/government relations.

In spite of this, the acquisition of easements remains the only permanent, legal means to provide public access across private lands. Therefore, to meet access needs of the future legal steps must be initiated now.

Purchase/Condemnation

The acquisition of easements by direct purchase or by right of condemnation is the practical, long-term means to provide legal access across private lands. Although the BLM does have an ongoing

program for road acquisition, the process is so slow as to be ineffective.

Authority for easement purchase has been delegated to the State Director. When a district office determines that an access road is highly desirable, a proposal and justification is submitted to the State Office. If the need is approved, it is then submitted to the Washington D. C. Office where final appropriation of funds takes place. It is not uncommon for this process to take four or five years. According to the State access specialist, of fifty-five easement requests submitted by the State Office to Washington D.C. in 1974, only three were fully reviewed and funded. Although all of the others are expected to be approved this will not be completed until sometime in 1975.

Once funds are appropriated, additional time is required to negotiate with the landowner for purchase. It is not uncommon for a stipulation to be made that the easement be fenced--in this case, construction time and funds must be incorporated into the annual work plan. Although this process requires more time, at least there is cooperation from the rancher and the right-of-way is assured. It is more likely that the purchase request will be denied. If this happens, the district office does not have the authority to use the appropriated funds for access elsewhere in the district. The only alternative is to initiate condemnation proceedings.

Condemnation authority, or eminent domain, is the power of the government to buy property for public use without the owner's consent. A condemnation proposal including a summary of the rancher's reasons for refusing to grant an easement is submitted to the Portland Service Center for review. It is then forwarded to the Regional Solicitor for court action.¹⁴ To this point the BLM in Montana has been very reluctant to pursue this alternative.

The unwillingness of Federal agencies to initiate condemnation proceedings has been noted and criticized by those interested in access. In a paper entitled "Access to Public Lands in Montana," Dr. V.A. Giliberti stated "...the fact that the Forest Service and the Bureau of Land Management have been reluctant to use condemnation when all else fails is strong evidence of either a disregard for the public right to use public land or the effects of adjoining landholder influence."¹⁵ Other states, notably California and Oregon, have used condemnation extensively without encountering significant adverse public opinion. As a long term solution to access problems in the Fergus Planning Unit, the purchase or if necessary the condemnation of lands should be used much more extensively.

Easement by Prescription

Montana State Statutes RCM 67-1201 and 93-2507 provide a means for this public to maintain a legal right-of-way over private

land without direct purchase. According to the statutes, a public road may be established by prescription if it can be shown that the public followed a "definite course continuously and uninterruptedly for the prescribed statutory period (5 years) together with an assumption of control adverse to the owner."¹⁶ Although this law provides an effective method to preserve rights-of-way over private land, the combination of expense, time and legal processes required to establish prescriptive easements, along with government hesitancy to initiate court proceedings, has resulted in the loss of public access through default. Both the Forest Service and the Bureau of Land Management are currently losing access as a result of road closures faster than new routes are being developed.

The acquisition of easement by prescription requires adherence to a number of strict requirements. The Montana State Supreme Court has set precedents which should certainly be noted. In Scott v. Weinheimer, "continuous and uninterrupted" use essential to establish easement by prescription was taken to mean that the use of the road was not restricted by an act of the owner--ie through the construction of a gate. The fact that a road has been barred by gates to be opened and closed by users was considered a strong evidence that the use was not adverse to the owner, with the result that easement by prescription could not be allowed.¹⁷

In Kostbade v. Metier, however, it was established that the construction of a gate alone could not preclude easement if the gate was admittedly built not to stop people but cattle, was never locked, and was only closed during summer.¹⁸ The question of the exact purpose of a gate can be a major issue, with testimony solicited from owners and users of the previous thirty years.

Although the presence of gates is the most prevalent factor in prescription there are several other potentially important considerations. For example, in some cases prescriptive easement was granted largely due to the fact that the county had at some point in time maintained the road in question. Other times easement was denied because the road did not follow one definite route throughout the statutory period. As a result, the court ruled that use of the road had not been "continuous and uninterrupted". Finally, if the landowner was consistently asked permission for use of the road, use could be interpreted as "mere license" and would preclude prescriptive rights.¹⁹

There are several roads in the unit which could undoubtedly be declared public if the BLM were to take the landowners to court. The Alpine Gulch Road is one example. In the last year there has been an increasing amount of hostility between the public and the landowner who is attempting to close the road. For years this area has been open for use particularly in the winter for Christmas tree cutting. This last year, however,

hostility has become apparent and the owners are verbally warning the public off their land. Up to now no gate has been constructed, and easement by prescription could be established. However, action must be taken before a substantial interruption occurs in the public use of the road.

A survey of court cases included in the Appendix provides a summary of important requirements which have been set for prescriptive easement.

Written Agreement

There are numerous cases where owners of private land hold grazing leases to adjoining public lands but block entry through their control of existing access routes. Where this situation occurs, remedy may be found by obtaining written agreements between the BLM District Manager and the rancher. Although this would provide only a short term solution, it would guarantee access at a time when it is needed rather than years in the future as is the case with direct purchase. In addition, the ranchers response to this possibility seems very good. While arrangements are made for more permanent access provision, the alternative of written use agreements should certainly be pursued.

Federal Regulation--Obstructing Settlement or Transit

Widely referred to as "The Act of February 25, 1885", this regulation states that no person may obstruct the entrance of

another onto public lands. However, judgement on cases brought before Federal courts has established that Congress was not concerned with the creation of a means of access to public lands, but with the matter of keeping the boundaries open, so that all those who could lawfully reach them might enter.²⁰ Clearly, this regulation does not reserve the public right of access across private land.

However, many instances have been reported where private landowners are illegally posting public lands against trespass. The Act of February 25, 1885 specifically prohibits this. "The policy of the government has been from the first to hold the unappropriated public lands as a great free common from all the settlers of the country where they lie, and for the exclusive use of no one."²¹ BLM policy has been, in fact, to remove trespass signs where they are posted in violation of this regulation. This course of action should certainly be continued along with an ongoing inspection program to prevent additional illegal signing.

CONCLUSIONS/RECOMMENDATIONS

As the demand for use of public lands increases, problems resulting from limited legal access to these lands become more acute. Although land administering agencies have the recourse under civil law to maintain access to public lands by legally defined roads or prescriptive rights-of-way, the degree of implementation of such legislation has not been adequate to meet the public's needs. Access is being lost faster than new routes are being developed.

Why is access being lost? The closure of roads across private lands is a strong indication of deteriorating relations with landowners. Part of the problem is a predictable outcome of too many people demanding access with too little supervision. Each rancher must protect his own property rights, and if closing an access road will achieve this, he will not hesitate to do so. This, in fact, is what is now occurring in this planning unit.

The resolution of the access problem does not lend itself to an easy solution. The public must be able to reach public lands in order to exercise their right to use, but at the same time the rights of the private property owner must be protected. Although the lack of access can be a serious problem, unlimited access is a solution that can create its own problems. Aldo Leopold recognized the situation as early as 1937. "... We are

faced with the self-defeating nature of mass use of our outdoor resources. The cycle is too familiar--a gain in quantity often results in a loss of quality."²²

Experience strongly suggests that additional access should not be provided until the Bureau has the capability--in terms of time, personnel, financing, and authority--to provide full management. Further, current use of public lands and use of private access roads should be more closely supervised in an attempt to maintain good rancher relations and to protect resources. Recreation areas should be developed to channel use and to provide needed public facilities.

Until legal access can be provided in conjunction with full management, there are a number of specific actions the BLM could take which would help to mitigate some of the problem. First, a major educational program directed at the public--particularly at special use groups--informing them of landowner/sportsmen issues and conflicts. Much of the difficulties are an outcome of ignorance and could be readily improved. Second, there is an immediate need for signing of public lands--this would help to minimize the cases of accidental trespass. It would also help to remind the public that even large, open spaces are predominantly private and require permission for use. Third, better maps showing the more prominent landmarks--these would help users identify exactly where they are with respect to public and private

lands. Finally, a continuation of the Bureau's program for the installation of cattleguards, which is helping to eliminate one of the rancher's chief reasons for posting.

while the purchase of easements is the only permanent method to provide access, this should be undertaken with the intent that more user supervision will also be provided. The capacity of the resource to support increasing recreation demand, along with traditional uses such as grazing, timber, and mineral production must be carefully considered and use levels established accordingly. Management plans should be developed that will preserve high land quality given the Bureau's current ability to enforce regulations, minimize use conflicts, and reduce environmental degradation. As was found in California, regulations and supervision will initially have to be based on programs of public information and education. The Lewistown District has the opportunity to reverse the trend of landowner hostility and user problems, but efforts must begin now.

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FOOTNOTES

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- 6 United States Department of Interior, op. cit., p. 7.
- 7 Lodico, Norma Jean, Environmental Effects of Off-Road Vehicles, United States Department of Interior, Office of Library Services, Sept. 1972, p. 11.
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20

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21

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United States Department of the Interior

BUREAU OF LAND MANAGEMENT

2000
(C-912)

STATE OFFICE

Federal Office Bldg., Room E-2841
2800 Cottage Way
Sacramento, California 95825

July 3, 1974

Miss Mary Annette Oleson
Bureau of Land Management
Drawer 1160
Lewistown, Montana 59457

Dear Miss Oleson:

Your questions about access are difficult to answer without reference to specific cases, but one notable case here in California was the Panoche Hills in the Colson District. We worked closely with off-road vehicle groups, particularly trail bike enthusiasts, to develop a management plan, delineate trails and post use and non-use areas. We found over several years that self-policing by the cyclists did not work for a number of reasons, including conflicts among the motorcyclists themselves, conflicts with other recreationists, and our inability to enforce the regulations. We finally had to close Panoche, which we were able to do because there is a single access road. The story is given in more detail in the enclosed copy of our newsletter, BLM NEWS BEAT.

Based on this and other experiences, it has been our policy not to develop access to areas unless or until we have the capability to provide full management. One case in point is the area of the Big Butte timber sale, which is discussed in the enclosed environmental impact statement.

In the absence of law enforcement authority, enforcement of regulations covering off-road vehicle use of the national resource lands has been based on persuasion using programs of public information and education, rather than on police-type action. In the case of organized events, such as motorcycle races, we have used such federal court proceedings as seeking injunctions to prohibit unauthorized races and trespass actions to collect damage and enjoin further races in cases where the events were actually run in trespass. In some cases we have been able to use state trespass statutes, but this depends upon the willingness and capability of local enforcement agencies to work with us.

Considerable study has been made of the need for enforcement authority comparable to that possessed by other federal resource management agencies (Forest Service, Park Service, Bureau of Sport Fisheries and Wildlife). One such effort was the California State Office law enforcement study, which is enclosed.

We would be pleased to try to answer specific questions you might have.

Sincerely,

A handwritten signature in dark ink, appearing to read "Jerry D. Harrell". The signature is written in a cursive style with a large, prominent initial "J".

Jerry D. Harrell
Chief, Public Affairs

Enclosures

PANOCHÉ HILLS (Cont'd. from p.4)

damage occurred, but not enough to prevent the same kind of event being held the next year.

Meanwhile, interest in bikes of all sizes was spreading. Riders began looking for places to go. Owners of private land started building fences and gates. Then the word got out that Panoche Hills was the place to go. People went in droves--in pickup trucks, in cars towing trailers and even in large rented trucks. Every vehicle packed one or more bikes. In 1968 almost 20,000 people and 12,000 bikes were counted in the area.

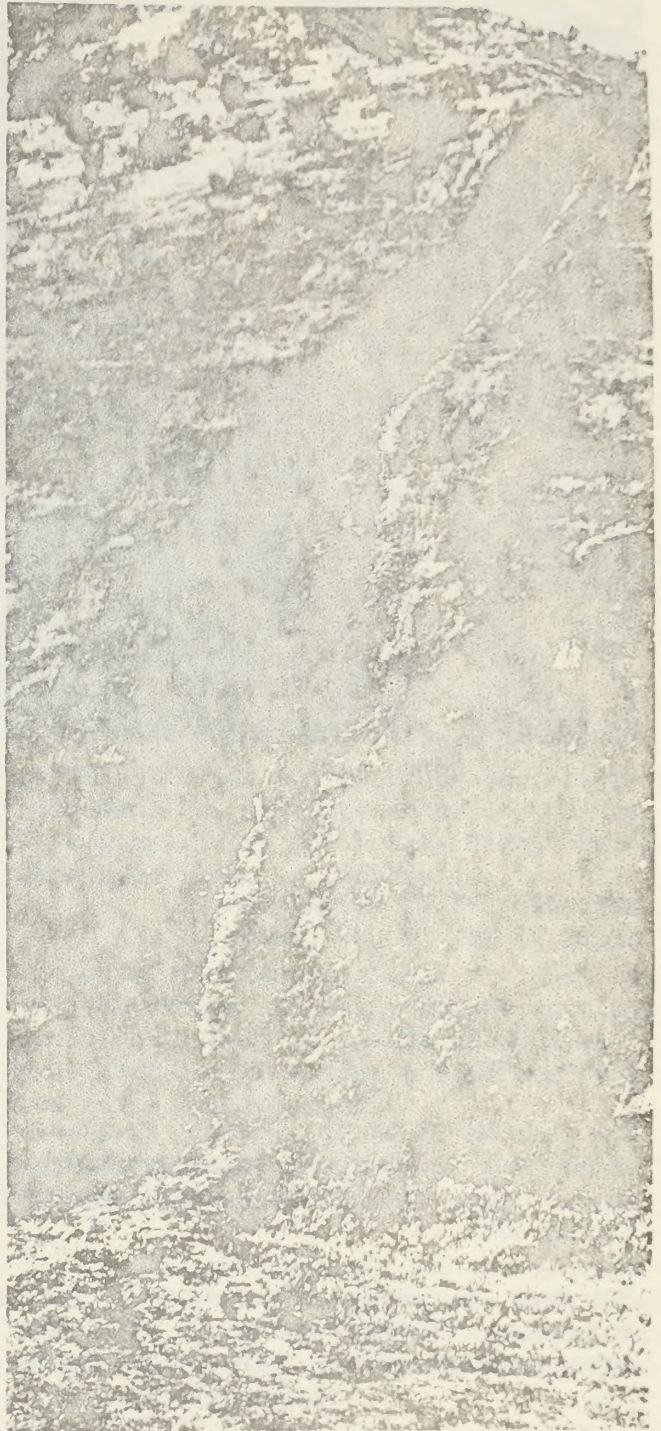
At the end of the 1968 season, BLM was beginning to get the picture. The number of bike trails was proliferating. Vegetation was being stripped off the hills. When the wind blew, it carried more dust. When the rain came, it could not penetrate the packed soil. The water ran off in tire tracks, washing gullies as it went.

Administrators of the area had learned their first lesson--the hard way. Unrestricted use was too destructive. Panoche Hills was closed to all vehicular use in April, 1969--until a better system could be found.

A plan for off-road vehicle use was worked out with a number of user groups and grazing lessees. The area was opened in July, 1969. The plan provided for a 15 mile loop trail and a 1,300 acre intensive use area.

Boundaries were carefully marked. Maps were provided. A cooperative information program was developed. BLM personnel and sheriff's deputies made weekend patrols. Some complaints were issued under state law.

(Cont'd. on p. 6)



BIKE WHEELS dig out shallow rooted vegetation on steep slopes, setting the stage for rain-washed gullies.



THE AERIAL PHOTO on the left was taken in 1967; the one on the right shows how the same area looked in 1969. Note growth in number of trails, especially in lower left hand corner.

RESEARCH EFFORT AT PANOCHÉ SEEKS REPAIR OF ORV DAMAGE

*By Dick Traylor
Folsom District
I&E Coordinator*

The Panoche Hills in western Fresno County have become a laboratory that might answer two of the hardest questions facing BLM:

How much punishment can a fragile ecology take from off-road vehicles? And, once severe damage occurs, how do you repair it?

No one intended Panoche to be a laboratory. It happened because of a lack of knowledge on BLM's part and a lack of concern on the part of some off-road vehicle operators.

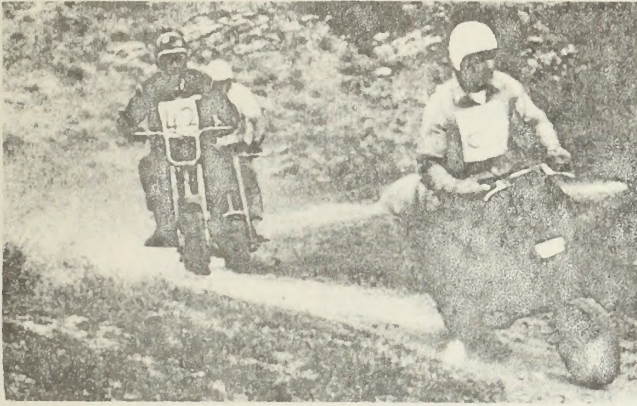
The story began in 1965 when the Bureau built an access road into the area to service grazing leases and to open the area to hunters.

The 33,000 acres administered by BLM range from gentle rolling terrain to steep canyons. The area has been grazed by sheep and cattle for more than 125 years. Average rainfall is eight inches annually. Only shallow rooted annual grasses have been able to survive grazing. The ecological balance has a thin skin. Any damage takes a long time to heal.

In 1967 a group of trail bike riders asked permission to hold a cross country race in the area. The event was well planned, monitored and supervised. It also was comparatively small. After the event, the area was thoroughly cleaned. A little
(Cont'd. on p. 5)



THE DRY SOIL is easily disturbed.



BIKES THAT KEEP to designated trails cause comparatively little damage.
(Cont'd. from p. 5)

This was not enough. There still were some who shrugged off the rules and roamed the entire area. Only a small percentage of the 22,000 people who visited the area in 1969 were in this category, but there still were too many. Damage was so extensive the area had to be closed again. The gate swung shut in March, 1970.

Since that time, BLM's Folsom District Office has been trying to rehabilitate the most severely damaged areas. At the same time, a number of research projects are being carried out.

In one denuded area, 55 acres with slopes up to 30 per cent grade, have been seeded. Gentler slopes have been disked and furrowed at one foot intervals. The furrows were seeded with a mixture of pubescent wheat grass, Blanco brome and Harbinger medic. Steeper slopes were raked with a harrow, seeded with a cyclone seeder and re-harrowed to cover the seed. "This seeding was recent and

due to a lack of rainfall, the grass has not yet sprouted.

On extreme slopes, BLM is using a method developed by the California State Division of Forestry to clear fire breaks on steep ridges. An anchor chain weighing 40 pounds per foot is pulled by a tractor across the ground. At the other end of the chain is a submarine net flotation ball, five feet in diameter, filled with water. The chain apparently does a good job of loosening the compacted soil. If the grass seed comes up in these areas, it will be a boon for rehabilitation.

The Agricultural Research Service, U.S. Department of Agriculture, is helping with a research project that will provide emergency revegetation to denuded areas, seek ways to break up compacted areas, and look for vegetation types that will withstand compacted soil.

Geological Survey has a research project to measure wind and water erosion that has occurred, and will occur in the next five years. The California Fish and Game Department is cooperating in this effort.

The gate will remain closed at least until the damage is repaired. Beyond that, it is not likely to open until BLM can make certain--this time, for sure--that the rules are followed.

ORV GROUP PLANS CLEANUP IN IMPERIAL SAND HILLS

The California Off-Road Vehicle Association will conduct a Johnny Horizon cleanup March 27 on BLM land in the Imperial Sand Hills, Garry Funk of Downey, CORVA vice-president announced.

Funk said the cleanup will be held in the Glamis area on Highway 78. He said the California Outdoor Recreation Association will assist.



Scott v. Weinheimer

140 M 554

in Fergus County

decided 07/13/62

Action by alleged dominant owners to enjoin servient owners from interfering with the use of right-of-way over road. The District Court rendered judgment for the plaintiffs and the defendants appealed.

Case history: Evidence shows that the plaintiffs and their predecessors have used a road which runs from their land across the property of the defendant to the State Secondary highway between Brooks and Denton, Montana. In 1949 a gate was erected on the west end of this road and was padlocked in 1956. As a result of this action, the County Attorney ordered the locks to be removed. On May 22, 1959, the road was again chained and padlocked and the plaintiffs were again prevented from passing over the road in question. At the insistence of the plaintiffs, the Sheriff of Fergus County contacted the defendants and requested that they unlock the gates so as to permit the plaintiffs passage over the road in question; up until the time of the trial the defendants refused to unlock the gates.

Decision: The Supreme Court held that evidence compelled conclusion that the plaintiffs acquired prescriptive easement of the road across the property of the defendants through use for 35 years before the defendants became owners of the land and attempted to obstruct use.

Kostbade v. Metier

150 M 139

decided 10/03/67

Action by landowners to determine whether a road that passed over their property was public or private, and to enjoin further interference by the county commissioners who had requested landowners to remove certain gates located on the road.

Case history: In 1938 a gate was constructed across the road. This gate was sometimes closed to keep cattle from drifting down the road, but was always left unlocked. The road was maintained by the county from 1940 to 1947. In 1964, the respondents constructed 2 gates across the road which they locked. These gates denied access to most of the road and were the impetus of this action to establish the right to maintain them.

Decision: The Supreme Court held that the construction of a gate, which was admittedly built not to stop people but cattle, and which was never locked, and which was only closed during summer across and allegedly private road which the public continued to use and which the county continued to maintain was not enough standing alone to rebut presumption of adverse use established by the public's use of the road for 25 or more years before the construction of the gate.

The road was declared public.

Brannon v Lewis & Clark County

143 M 200

decided 11/06/63

Suit by property owner against county for alleged trespass and continuing trespass by maintenance of a highway across plaintiffs' land.

Decision: The Supreme Court held that where county continuously used strip of land across plaintiffs' property as a public highway without plaintiffs' consent and against her will for some eleven years after entry of judgment quieting title in plaintiff, and county paved the highway and entered upon such land in violation of the plaintiffs' right, county acquired roadway by prescription.

The roadway was declared public.

Descheemaeker v. Anderson

131 M 322

decided 04/29/57

Action to quiet title to a roadway extending across plaintiff's land.

Case history: The dispute is confined to a roadway extending from what is known as the Joliet-Columbus Road across part of the respondents land to what is known as the Joliet-Creek Road. Appellants contend that a public road exists. Respondents contend that no public road exists; that the road is owned by them and traveled at sufferance by the public generally with the respondents' consent.

Decision: The fact that a passage of a road has been for years barred by gates or other obstructions to be opened and closed by the parties passing over the land, has always been considered as strong evidence in support of a mere license to the public to pass over the designated way. Evidence of use by the public of a road obstructed by gates, standing alone, is insufficient to establish a highway by prescription.

No public road exists.

Violet v. Martin

62 M 342

decided 02/20/22

Plaintiffs brought action alleging a road to exist over the lands of the defendant - (1) as a private way of necessity and (2) as a public road by way of prescription.

Decision:

(1) Way of necessity: evidence shows that the plaintiffs have other ways out - not so good or convenient as the one sought, yet they admit traveling over them. A way of necessity cannot be established by reason of convenience.

(2) To arrive at a conclusion that a way over the lands of another is a public road, the evidence must be convincing that the public has pursued a definite, fixed course continuously and uninterruptedly, and coupled with it an assumption of control and right of use adversely under claim of right, and not merely by owner's permission, over it for the statutory period (5 years). In this case, the public never assumed any jurisdiction or exercised any rights over the road in question, nor did it regard the travel there adversely. There has always been a gate at one end and since 1913 there has been a gate at the other end, both of which have been recognized by the plaintiffs and such other persons as occasionally passed over it.

The way in dispute is not and never has been a private way of necessity nor a public road.

This intern report was read and accepted by a staff member at:

Agency: Bureau of Land Management

Address: Bank Electric Building, 5th & Main

Drawer 1160

Lewistown, Montana 59457

This report was completed by a WICHE intern. This intern's project was part of the Resources Development Internship Program administered by the Western Interstate Commission for Higher Education (WICHE).

The purpose of the internship program is to bring organizations involved in community and economic development, environmental problems and the humanities together with institutions of higher education and their students in the West for the benefit of all.

For these organizations, the intern program provides the problem-solving talents of student manpower while making the resources of universities and colleges more available. For institutions of higher education, the program provides relevant field education for their students while building their capacity for problem-solving.

WICHE is an organization in the West uniquely suited for sponsoring such a program. It is an interstate agency formed by the thirteen western states for the specific purpose of relating the resources of higher education to the needs of western citizens. WICHE has been concerned with a broad range of community needs in the West for some time, insofar as they bear directly on the well-being of western peoples and the future of higher education in the West. WICHE feels that the internship program is one method for meeting its obligations within the thirteen western states. In its efforts to achieve these objectives, WICHE appreciates having received the generous support and assistance of the Economic Development Administration; the Jessie Smith Noyes Foundation; the National Endowment for the Humanities; the National Science Foundation; the Division of Education of HEW; and of innumerable local leaders and community organizations, including the agency that sponsored this intern project.

For further information, write Bob Hullinghorst, Director, Resources Development Internship Program, WICHE, Drawer 'P', Boulder, Colorado 80302, (303) 443-6144.

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